IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 472 of 2005

LR'S OF BHOJRAJ
V/S
AASAN DAS

Mr. RAKESH ARORA, for the appellant / petitioner

Mr. SL JAIN, for the respondent

Date of Order : 8.9.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the parties, and perused the impugned judgments of the two learned courts below.

It is contended by the learned counsel for the appellant is that in view of the provisions of Section 59 of the Transfer of Property Act, the mortgage in the present case is not proved as neither there is any registered mortgage, nor any stamped document of mortgage has been proved, and therefore, the impugned decree is liable to be set aside. The other submission made is that the present suit was barred by res judicata.

A look at the judgment of the learned trial court shows that it has negatived the suit interalia on the ground that alleged mortgage deed is not registered, and

therefore, does not create mortgage in accordance with Section 59 of the Transfer of Property Act, and the oral evidence is not admissible in view of the provisions of Section 91 of the Evidence Act.

The learned lower Appellate Court has reversed this finding by relying upon a judgment of Gujarat High Court in Kanba Laddha Vs. Joshi Jeshta Ram reported in AIR 1971 Gujarat-239.

In my view apart from the said judgment of Gujarat High Court, a Special Bench of this Court in Lachhmi Narain Vs. Kalyan reported in AIR 1960 Rajasthan-1 has held that the limited right of mortgagee can be acquired by adverse possession. It can be so acquired even if a mortgagee has obtained possession under a void or inoperative mortgage-deed. The provisions of the Transfer of Property Act (S. 59) are not in any way affected on account of acquisition of rights by prescription. The rights of the parties can beregulated by law if no valid agreement exists. It is not substituting a new contract by giving effect to a relationship created by the operation of law. It was further held that the provisions of S. 49 of the Registration Act or S. 91 of the Evidence Act also are not affected because an unregistered document can be availed of for the purpose of showing character and nature of possession if the possession is transfered under such

document. With this it was found that a suit for redemption of the mortgage created by the operation of law is governed by Art. 148 and the period will run after the expiry of 12 years from the date when possession was taken under such mortgage deed. In the present case, last mortgage is said to be of 23.2.1974, and the suit has been filed after 12 years of that date having been filed on 17.9.1986.

Then, the learned lower Appellate Court has discussed the evidence of the parties, and various documents available on record including the admissions of the defendant contained in Ex. 14 and 15, and in Ex. 5 and 9. Thus, the learned lower Appellate Court, on appreciation of evidence, has come to the conclusion, that the plaintiff has proved the mortgage.

Likewise, significantly the defence of the defendant was, about his having purchased the house from the plaintiff, which defence has been negatived even by the learned trial court, while deciding issue no. 12, against which no cross-objections were filed.

Coming to the second submission, in this regard also it would suffice to say that issue no. 13 was decided against the appellant by the learned trial court, and that finding had not been challenged by the appellant before the learned lower Appellate Court.

In my view thus the findings recorded by the learned lower Appellate Court are pure findings of fact, and capable of being arrived at in view of the Special Bench judgment of this Court in Lachhmi Narain, and are not vitiated on any of the grounds available under Section 100 C.P.C.

The appeal thus has no force, and the same is hereby dismissed.

(N P GUPTA),J.

/Sushil/